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GOOGLE INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE

14 IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

Case No. 5:11-cv-2509-LHK

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16 THIS DOCUMENT RELATES TO:
17 ALL ACTIONS
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**DEFENDANTS' JOINT RENEWED
MOTION TO SEAL MATERIALS IN
CONNECTION WITH SUMMARY
JUDGMENT AND DAUBERT MOTIONS
AND DEFENDANTS' MOTION TO
STRIKE**

Pursuant to Local Rule 7-11 and 79-5, defendants Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit Inc., Lucasfilm Ltd., and Pixar (collectively, “Defendants”) hereby provide a renewed motion to seal materials filed in connection with the parties’ motions for summary judgment, *Daubert* motions, and Defendants’ Joint Motion to Strike the Improper Rebuttal Testimony in Dr. Leamer’s Reply Expert Report. During the March 27, 2014 Case Management Conference, Defendants offered to re-visit the instant sealing requests in light of the Court’s ruling on requests to seal materials in connection with Plaintiffs’ Supplemental Motion for Class Certification [Dkt. 730]. The Court accordingly denied Defendants’ pending sealing requests without prejudice. [Dkt. 768].

Defendants hereby jointly move to seal redacted portions of materials filed in connection with the following motions:

1. Notice of Motion and Motion by Intel Corporation for Summary Judgment Pursuant to Fed. R. Civ. Pro. 56 [Dkt. 554];
2. Defendants’ Joint Notice of Motion and Motion for Summary Judgment based on Motion to Exclude Testimony of Dr. Edward E. Leamer, Ph.D. [Dkt. 556];
3. Defendants’ Joint Notice of Motion and Motion to Strike the Improper Rebuttal Testimony in Dr. Leamer’s Reply Expert Report [Dkt. 557];
4. Defendants’ Notice of Motion and Joint Motion to Exclude the Expert Testimony of Matthew Marx, Ph.D. [Dkt. 559];
5. Defendant Adobe’s Motion for Summary Judgment [Dkt. 560];
6. Defendant Apple Inc.’s Notice of Motion and Motion for Summary Judgment [Dkt. 561];
7. Defendant Google Inc.’s Notice of Motion and Motion for Summary Judgment [Dkt. 564];
8. Plaintiffs’ Notice of Motion and Motion to Exclude Expert Testimony Proffered by Defendants [Dkt. 565];
9. Defendants’ Notice of Motion and Joint Motion to Exclude the Expert Testimony of Edward E. Leamer, Ph.D. [Dkt. 570].

The redacted information has been designated Confidential or Attorneys’ Eyes Only under the Stipulated Protective Order (Modified by the Court) (Dkt. No. 107). Defendants are

1 concurrently filing a proposed order listing each document sought to be redacted and the specific
2 support for each request.

3 **I. LEGAL STANDARD**

4 Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial
5 court to permit sealing of documents for, inter alia, the protection of “a trade secret or other
6 confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G).

7 Where the documents are submitted in connection with a dispositive motion, the Ninth
8 Circuit has ruled that documents should be sealed when “compelling reasons” exist for protecting
9 information from public disclosure. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178-
10 79 (9th Cir. 2006). Courts have found that “[o]ne factor that weighs in favor of sealing
11 documents [under the compelling reasons standard] is when the release of the document will
12 cause competitive harm to a business.” *Apple v. Samsung*, 727 F.3d 1214, 1221-22 (Fed. Cir.
13 2013); *Apple Inc. v. PsystarCorp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (“The publication of
14 materials that could result in infringement upon trade secrets has long been considered a factor
15 that would overcome this strong presumption.”); *see also Nixon v. Warner Commc’n, Inc.*, 435
16 U.S. 589, 598 (1978) (“common-law right of inspection has bowed before the power of a court to
17 insure that its records” are not used as “sources of business information that might harm a
18 litigant’s competitive standing”). Moreover, the release of trade secrets constitutes “compelling
19 reasons” sufficient to outweigh the public’s interest in disclosure. *Samsung*, 727 F.3d at 1221-22.

20 **II. COMPELLING REASONS EXIST TO SEAL CONFIDENTIAL INFORMATION** 21 **SUBMITTED IN CONNECTION WITH THE SUMMARY JUDGMENT,** 22 **DAUBERT, AND MOTION TO STRIKE FILINGS.**

23 The redacted portions of the materials Defendants seek to seal contain highly confidential
24 and commercially sensitive information about employee compensation, including Defendants’
25 compensation data as well as information that reflects Defendants’ internal business strategies
26 related to compensation and internal assessments of their and other employers’ competitive
27 position in the labor market. Defendants also seek to keep under seal materials that reflect
28 confidential hiring data, which reveal confidential recruiting and hiring strategies, practices, and
policies. Defendants further seek to keep under seal information in business contracts which

1 reflect internal business strategies, policies, and practices. Finally, defendants seek to keep under
2 seal the personal identifying or private information of employees and third parties. Defendants
3 designated the foregoing information “Confidential” or “Attorneys Eyes Only” under the
4 Protective Order.

5 As the accompanying declarations demonstrate, Defendants keep the sealed information
6 confidential and the public disclosure of certain information would cause each Defendant harm by
7 giving third-parties (including individuals responsible for competitive decision-making) insights
8 into confidential and sensitive aspects of each of the Defendants’ strategies, competitive
9 positions, and business operations, allowing these third-parties to potentially gain an unfair
10 advantage in dealings with and against each of the Defendants.

11 This type of information is regularly sealed because disclosure could cause competitive
12 harm. *See, e.g., Rich v. Shrader*, No. 09CV652, WL 6028305, at *3-4 (S.D. Cal. Nov. 13, 2013)
13 (granting motion to seal deposition testimony attached to summary judgment motion that contains
14 “information on Booz Allen compensation policies” and “internal policies and controls with
15 regards to employee performance and review”); *Krieger v. Atheros Commc’ns, Inc.*, No. 11-CV-
16 00640, 2011 U.S. Dist. LEXIS 68033 at *3-4 (N.D. Cal. June 25, 2011) (sealing “sensitive and
17 confidential information, including long-term financial projections, discussions of business
18 strategy, and competitive analyses” under the compelling reasons standard); *EEOC v. Kokh, LLC*,
19 No. CIV-07-1043, 2010 U.S. Dist. LEXIS 82526, at n.1, 2010 BL 187807 (W.D. Okla. Aug. 09,
20 2012) (sealing summary judgment materials that discuss “confidential salary information”);
21 *Network Appliance, Inc. v. Sun Microsystems Inc.*, No. C-07-06053, 2010 U.S. Dist. LEXIS
22 21721, at *9 (N.D. Cal. Mar. 10, 2010) (sealing “internal information regarding [defendant’s]
23 business strategies and opportunities that were not widely distributed”); *see also TriQuint*
24 *Semiconductor, Inc. v. Avago Techns. Ltd.*, No. CV 09-531, 2011 U.S. Dist. LEXIS 143942, at *9
25 (D. Ariz. Dec. 13, 2011) (granting motion to seal “market analysis information,” under
26 compelling reasons standard, including business strategy documents, such as information relating
27 to “product competitiveness, and market and technological opportunities and risks”).

28 Moreover, the redacted information constitutes trade secrets, defined as “any formula,

1 pattern, device or compilation of information which is used in one's business, and which gives
2 him an opportunity to obtain an advantage over competitors who do not know or use it."
3 *Samsung*, 727 F.3d at 1221-22. As evidenced by the accompanying declarations, the information
4 Defendants seek to seal relate to Defendants' internal business practices and strategies used in
5 compensating, recruiting, and hiring employees, as well as the confidential terms of business
6 agreements. This falls plainly within the trade secrets definition. *Id.*; *see also In re Electronic*
7 *Arts, Inc.*, 298 F. App'x. 568, 569-70 (9th Cir. 2008).

8 Further, specific employee salary information is regularly sealed because of its
9 confidential and private nature. *See Renfro v. Unum*, No. 09-2661, 2010 BL 104197 (N.D. Cal.
10 May 10, 2010) (granting a motion to seal records containing plaintiffs' salary information);
11 *Nettles v. Farmers Ins. Exch.*, No. C06-5164, 2007 WL 858060, at *2 (W.D. Wash. Mar. 16,
12 2007) (holding that salary review notices for third parties "who have not chosen to have their
13 salary history placed into the public record" could be sealed.); *EEOC v. Kokh, LLC*, No. CIV-07-
14 1043, 2010 WL 3155900, at *1 n.1 (W.D. Okla. Aug. 09, 2010) (noting that portions of summary
15 judgment materials were filed under seal because they contained "confidential salary
16 information"). In addition, personal identifying information of third-party employees should be
17 sealed because they have not sought to make their identities known or placed in the public record.
18 *Nettles* at *2 (holding that the interests of private parties outweighed the public's right of access
19 with respect to information pertaining to third party salary and employment separation
20 information).

21 **III. CONCLUSION**

22 For the foregoing reasons, Defendants respectfully request that this Court order the above-
23 referenced materials be placed under seal.

1 Dated: April 10, 2014

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9 **ATTESTATION:** The filer attests that concurrence in the filing of this document has been
10 obtained from all signatories.
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